



## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated December 8, 2005, the Board found the case not in posture for decision.<sup>1</sup> The case was remanded to the Office for further medical development on the impairment to appellant's right upper extremity. The facts and law of the previous Board decision are incorporated herein by reference.

On January 16, 2006 the Office referred appellant to Dr. Melvin M. Grossman, a Board-certified neurologist, for a second opinion evaluation regarding her right upper extremity impairment. By report dated January 30, 2006, Dr. Grossman advised that appellant had an eight percent whole person impairment. In a February 22, 2006 report, he advised that she had a 21 percent right upper extremity impairment. An Office medical adviser subsequently determined that Dr. Grossman's findings were contradictory.

On April 20, 2006 appellant was referred to Dr. Morton S. Corin, also Board-certified in neurology, for a second opinion evaluation. By report dated May 8, 2006, he found that appellant had no ratable impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

By decision dated May 31, 2006, the Office found that appellant was not entitled to a schedule award greater than the nine percent previously received.<sup>2</sup>

In a letter dated May 31, 2006, appellant complained about her examination by Dr. Corin.<sup>3</sup> On May 18, 2007 she requested reconsideration, arguing that, as Dr. Corin did not conduct a thorough examination, his report should not constitute the weight of the medical evidence.

In a May 31, 2007 decision, the Office denied appellant's reconsideration request.

## **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>4</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>5</sup> Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least

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<sup>1</sup> Docket No. 05-1569 (issued December 8, 2005). Appellant, then a 48-year-old special agent, sustained an employment-related median neuropathy of the right upper extremity on October 26, 1999. By decision dated June 10, 2005, she was granted a schedule award for a nine percent impairment of the right upper extremity.

<sup>2</sup> *Supra* note 1.

<sup>3</sup> Appellant noted that she had changed her address to 5900 Old Ocean Boulevard, #B-5, Ocean Ridge, Florida 33435.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 5 U.S.C. § 8128(a).

one of the standards described in section 10.606(b)(2).<sup>6</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>7</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

### ANALYSIS

The only decision before the Board in this appeal is the decision of the Office dated May 31, 2007 denying appellant's application for review. Because more than one year had elapsed between the date of the Office's most recent merit decision dated May 31, 2006 and the filing of her appeal with the Board on August 30, 2007, the Board lacks jurisdiction to review the merits of her claim.<sup>9</sup>

The Board notes that a claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment at a later date causally related to an employment injury.<sup>10</sup> Office procedures state that claims for increased schedule awards may be based on an incorrect calculation of the original award or new exposure.<sup>11</sup> However, in a case such as this where appellant is merely asserting that the original award was erroneous based on her medical condition at that time and submits no additional medical evidence, the request is considered a request for reconsideration.<sup>12</sup>

With her May 18, 2007 reconsideration request, appellant argued that Dr. Corin's report should not be given weight. While reopening a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>13</sup> The Office has the authority to order examinations of an injured employee as frequently and at such times and places as may be reasonably required.<sup>14</sup>

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<sup>6</sup> 20 C.F.R. § 10.608(a).

<sup>7</sup> 20 C.F.R. § 10.608(b)(1) and (2).

<sup>8</sup> 20 C.F.R. § 10.608(b).

<sup>9</sup> 20 C.F.R. § 501.3(d)(2).

<sup>10</sup> *Rose V. Ford*, 55 ECAB 449 (2004).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b) (November 1998).

<sup>12</sup> *Rose V. Ford*, *supra* note 10.

<sup>13</sup> *See Elaine M. Borghini*, 57 ECAB \_\_\_\_ (Docket No. 05-1102, issued May 3, 2006).

<sup>14</sup> *See* 5 U.S.C. § 8123(a); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Second Opinion Examinations*, Chapter 3.500.3 (March 1994).

Appellant submitted no evidence to support her contentions regarding Dr. Corin, and the record does not support that his examination or report should not be considered. Her argument therefore does not have a reasonable color of validity.<sup>15</sup> Appellant did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>16</sup>

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted no additional evidence. As she did not submit relevant and pertinent new evidence not previously considered by the Office, she was not entitled to a merit review under this requirement, and the Office properly denied her reconsideration request.<sup>17</sup>

### **CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 31, 2007 be affirmed.

Issued: February 7, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> See *Elaine M. Borghini*, *supra* note 13.

<sup>16</sup> 20 C.F.R. § 10.606(b)(2).

<sup>17</sup> *Id.*